No. 2415.

United States Circuit Court of Appeals,

For the Ninth Circuit.

U. S. Oil & Land Company, a corporation,
Appellant,

vs.

Teresa Bell as Administratrix of the Estate of Thomas Bell, Deceased, with the Will annexed, et al.,
Appellees.

APPELLANT'S REPLY BRIEF

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Mr. Crittenden, one of the solicitors for complainant, availing himself of the courtesy and kindness of the Court, presents this reply brief in place of the closing oral argument which he was unable to make.

It appears conclusively from the bill and the issues raised by the answers of defendants that the case now before this court was never tried by or submitted to any court and could not have been submitted, or tried or decided in either *Bell* v. *Staacke* or *Bell* v. *San Francisco Savings Union,* for it presented in the court below and presents here the rights and interests acquired by the U. S. Oil and Land Company (appellant here) under, or resulting from, the decree in *Bell* v.

San Francisco Savings Union and acts done by the parties to that suit *subsequent* to the affirmance by the Supreme Court of the final decree therein contrary to the orders and provisions of said decree and in violation of the rights and interests of complainant, and also presents and involves the questions as to whether said decree in *Bell* v. *San Francisco Savings Union* was conclusive upon all rights of the parties to said suit irrespective of the pretended second decree in *Bell* v. *Staacke*, and whether all the rights claimed thereunder by Teresa Bell and the other defendants were waived and barred by failure to plead the pretended second decree in *Bell* v. *Staacke* in the later suit of *Bell* v. *San Francisco Savings Union* and by failure to apply by motion either for abatement of the said later suit or a stay of all proceedings therein.

The validity and finality of the *first* decree in *Bell* v. *Staacke,* the vested rights of the U. S. Oil and Land Company as purchaser of an undivided half of the 10,000 acre tract from its grantor in actual possession thereof on the 18th day of September 1902 while under the settled law of the state of California said first decree in *Bell* v. *Staacke* and the order denying a new trial were final and conclusive, and the conclusiveness of the decree in *Bell* v. *San Francisco Savings Union* and the right and interest of the U. S. Oil and Land Company in and to an undivided one-half of the 10,000 acre tract (conclusively established by the findings therein), and to one-half of any surplus proceeds arising from a sale thereof under said decree which must have been at least $1,000,000, —are the material and important questions involved in this suit and on the appeal.

If said *first* decree in *Bell* v. *Staacke* and the order denying a new trial therein were final and conclusive, as we assert and maintain, then there was no other decree or order or valid proceeding therein and neither the superior court nor the Supreme Court of the state of California had any jurisdiction, power of authority

to change either said order or decree, or to grant any new trial or to set aside said order, or to retry said action, and the appellant is entitled to a reversal of the decree of the U. S. District Court and to a decree in its favor as prayed for by the bill.

If said first decree in *Bell* v. *Staacke* and the order therein denying a new trial were not final and conclusive the subsequent proceedings therein were unavailing and of no effect against the decree and findings in the later suit of *Kate M. Bell et al.* v. *San Francisco Savings Union et al.* as the U. S. Oil & Land Company was a party only to this later suit involving all parties in interest and all issues involved in *Bell* v. *Staacke,* and as all the rights, interests and claims of all the parties were tried, decided and adjudicated in said later suit.

Before discussing the main questions we desire to call the court's attention in the first place to the admission on page 8 of the brief for appellees Hammon and Van Deinse that "The statement of facts in the brief for appellant follows in the main the allegations of the bill" is a correct statement of the facts, decrees and findings alleged, and that there are no material issues of fact raised by any of the answers of defendants, and in the second place, to the following well settled rules and principles of law, which we beg the court to bear in mind in passing upon the main questions at issue and which, we believe, are decisive of the questions involved on this appeal, and will aid the court in arriving at a decision.

(1) An action is NOT tried until ALL the issues have been disposed of by findings of fact and conclusions of law on *all* the issues.

> *Bell* v. *Marsh,* 80 Cal., 414;
> Cases cited on pp. 29-30 and 35-41 of appellant's brief.

(2) There can be *but one decision* where the action is tried by the court whether it consists of one, two or more sets of findings of fact and conclusions of law.

Bell v. *Marsh*, supra.
Cases cited on pp. 29-30 and 35-41 of appellant's brief.

(3) There can be only one valid notice of intention to move for a new trial—a notice given *after* the *last* findings are filed.

Dorland v. *Cunningham*, 66 Cal., 485 (decision by McKinstry, Ross and McKee);
Cases cited on pp. 29-30 and 35-41 of appellant's brief.

(4) A notice of intention to move for a new trial given *before* the *last* findings are filed is premature—*can give to the court no power to act upon the motion—is ineffectual for any purpose*—gives to the court *NO JURISDICTION over the motion*—and must be denied.

Bates v. *Gage*, 49 Cal. 126;
Bell v. *Marsh*, 80 Cal., 411;
Reclamation Dist. No. 556 v. *Thisby*, 131 Cal., 574;
Harris v. *Careaga*, 1 W. C. Rep., 467;
Cases cited on pp. 29-30 and 35-41 of appellant's brief.

(5) The settled construction of section 659 of the Code of Civil Procedure of California from 1860 to December 28th, 1903 by the decision of the Supreme Court of California became and was in effect a part of the section or statute itself.

Douglas v. *County of Pike*, 101 U. S., 677, 686-*687*; (see note p. 668 as to reversal of other decisions on the same ground.)
Kuhn v. *Fairmont Coal Co.*, 215 U. S., 349, 359-360, and cases cited in decision (decided Jan. 3, 1910.);
Estate of A. P. More, 143 Cal., 493, *495*, *500*;
Fairfield v. *County of Gallatin*, 100 U. S., 47;
Supervisors v. *United States*, 18 Wall., 71;
County of Ralls v. *Douglas*, 105 U. S., 731, 732;

Green County v. *Conness*, 109 U. S., 104;
Anderson v. *Santa Ana*, 116 U. S., 361;
German Savings Bk. v. *Franklin County*, 128 U. S., 526, 539;
Loeb v. *Trustees of Columbia Tnsp.*, 179 U. S., 492;
State v. *Mayor of Bristol*, 109 Tennessee, 323;
Barnitz v. *Beverly*, 163 U. S., 118;
Marshall v. *Elgin*, 8 Fed. Rep., 787;
Lepine v. *Marrego*, 116 La., 942; 41 Southern Rep., 217;
Pomeroy's Constitutional Law (7th Ed.) sec. 592;
Cases cited on pp. 30, 44-52 of appellant's brief.

The Supreme Court of the United States, in *Douglas* v. *County of Pike*, 101 U. S., 687, says:

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of the decision is to all intents and purposes the same in its effect on contracts as the amendment to the law by means of a legislative enactment."

The Supreme Court of the United States, in *Von Hoffmann* v. *City of Quincy*, 4 Wall., 535, says:

"It is also settled that the laws which subsisted at the time and place of the making of a contract, and where it is to be performed, ENTER INTO AND FORM A PART OF IT, *as if they were expressly referred to or incorporated in its terms.* This principle embraces alike those which affect its validity, construction, discharge, and enforcement. * * * The ideas of validity and remedy are inseparable, *and both are parts of the obligation which is guaranteed by the Constitution against invasion.* The obligation of a contract is the law which binds the parties to perform their agreement. The prohibition has no reference to the *degree*

of impairment; the largest and *the least* are alike forbidden."

Von Hoffman v. *City of Quincy,* 4 Wall., 535;
Edwards v *Kearzey,* 96 U. S., 595;
Wolf v. *New Orleans,* 103 U. S., 358;
Robinson v. *Magee,* 9 Cal., *83*;
People v. *Bond,* 10 Cal., *572*, and cases cited;
Creighton v. *Pragg,* 21 Cal., *119*;
Thorne v. *San Francisco,* 4 Cal., 131-138, and cases cited.

(The court, in an able review of the authorities, shows the injustice and great wrong of applying a new law or statute, or rule of law, to a contract where rights have vested under the law existing at the time of the making of the contract, and quotes Chase J., from 2 Dall. Rep., p. 386, *Calder Bull,* "that every law that takes away or impairs rights vested agreeably to existing laws, is retrospective and unjust, and that it is a general rule that a law shall have no retrospect." p. 135).

The Supreme Court of California, in bank, in *Bates* v. *Gregory* 89 Cal., , quotes with approbation the extract above quoted from *Von Hoffman* v. *City of Quincy,* 4 Wall., 535.

The Supreme Court of California, in *Ede* v. *Knight,* 93 Cal., 161, says:

"A valid contract cannot be abrogated by the adoption of a new Constitution, any more than it can be by the enactment of a law by the legislature," citing 2 How. (U. S.) 613; 1 Black, 436, and 3 Parsons on Contracts, sec. 555.

Angellotti, in Estate of More, *supra,* citing many decisions, said:

"The *settled construction of a statute* (Sec. C. C. P. as to time of giving notice of appeal) * * * *is*

in effect a part of the statute itself, and should not be changed by the courts."

Estate of More, 143 Cal., 495, 500.

(6) A *settled construction of a statute* becomes as much a part of the statute *as if it were a part of the text thereof* so far as contract rights are concerned, and in a case involving those rights *any subsequent decision* in conflict with the former decisions construing the statute *cannot affect contracts already made or any contract right accrued while the former decisions were in force.*

Authorities cited *supra* under (5).

(7) The jurisdiction of any court exercising authority over a subject *may be inquired into in every other court* when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings.

Williamson et al. v. *Berry,* 49 U. S. (8 How.) 495-10, 540-541.

(8) If a court *acts without authority* its orders and judgments are *nullities*—not voidable but void—form no bar to a recovery sought—constitute no justification —and every person executing the same is considered in law a trespasser.

Williamson et al. v. *Berry,* 49 U. S. (8 How.) 540;
Wilcox v. *Jackson,* 13 Pet., 499;
Shriver's Lessee v. *Lynn et al.,* 2 How., 59;
Lessee of Hickey v. *Stewart et al.,* 3 How., 750;
Christmas v. *Russell,* 5 Wall., 305;
Thompson v. *Whitman,* 18 Wall., 457;
McElmoyle v. *Cohen,* 13 Pet., 312;
Knowles v. *Gas, Light & Coke Co.,* 19 Wall., 58;
D'Arcy v. *Ketchum,* 11 How., 165;
Webster v. *Reed,* 11 How., 437;
Harris v. *Hardemann,* 14 How., 334;
Kingsbury v. *Ynestra,* 59 Ala., 320.

(Held that a judgment reciting that defendant was served with process or appeared by attorney might be controverted and that it might be shown he was not served with process and was not in any manner brought into court and had not submitted himself to the jurisdiction or appeared by attorney or otherwise.)

(9) A party cannot avail himself of a former judgment as a defense without pleading it.

McLean v. *Baldwin,* 136 Cal., 565, 569;
Brown v. *Campbell,* 110 Cal. 645-650;
Cave v. *Crafts,* 53 Cal., 135;
Freeman on Judgments, sec. 322, and cases cited.

The Supreme Court of California, in *McLean* v. *Baldwin,* says:

"*It is well settled* that a party *cannot* avail himself of a former judgment as a defense without pleading it."

McLean v. *Baldwin,* 136 Cal., 565, 569.

(10) A failure to plead a former judgment rendered in a prior action and to move for an abatement of the later action or a continuance of all proceedings therein until the former judgment has become final *operates as and is a waiver* of all rights and of every claim of estoppel under the former judgment, and the later judgment controls and is conclusive upon all parties to the action.

Brown v. *Campbell,* 110 Cal., 645650;
Brown v. *Campbell,* 100 Cal., 635;
In re Blythe, 99 Cal., 472;
Simple v. *Wright,* 32 Cal., 659;
Cases cited in Appellant's Brief, pp. 33-34, 60-70.

(11) A trustee ordered and directed by a decree *to sell* in a certain manner and report sale subject to

confirmation cannot either sell in any other manner,—cannot sell without confirmation—cannot transfer or convey without selling,—and any sale, transfer or conveyance made contrray to the directions of the decree passes no title or interest and *is wrongful, illegal and ABSOLUTELY VOID.*

Bank of United States v. *Ritchie et al.,* 8 Pet. (33 U. S.), *146*;
Kenady v. *Edwards,* 134 U. S., 117 *125*;
Civil Code of California, sec. 870.

The Court, by Marshall, Ch J., in *Bank* v. *Ritchie, supra,* a case in which the trustee did just what the Mercantile Trust Company has done in the case at bar, says:

> "The decree itself was disregarded by the trustee, in executing the conveyance. * * * The court has not intrusted to him the right of deciding on the debts *and disposing of the purchase money. He is only to receive it before he conveys; and consequently should hold it subject to the order of the court.* It does *not* appear, *that he has ever received a cent. He undertakes to settle the account of Mr. Ritchie, the purchaser, and convey the property to him, in violation of the decree;* on being satisfied by him that he had paid all the debts, and was himself a creditor to an amount exceeding the purchase money. He had no right to be satisfied of these facts. The court had not empowered him to inquire into or decide them. *He has transcended his powers, and with the knowledge of the purchaser, and in combination with him, has executed to him a deed which the law did not authorize. THE WHOLE PROCEEDING WAS IRREGULAR, AND OUGHT TO BE SET ASIDE.* The plaintiffs in the original suit will then be at liberty to prosecute their claims according to law." (p. 146.)

The Supreme Court of the United States, in *Kenady* v. *Edwards*, 134 U. S. 117, *125*, held that even *an order approving a trustee's sale made without notice to the parties to the suit was not valid.*

The finality of the decree in *Kate M. Bell et al.* v. *San Francisco Savings Union et al.* being admitted and confessed by the answers of defendants and their briefs, and it being further admitted by said answers and briefs that no sale of any of the property has ever been made under said decree and that the Mercantile Trust Company, trustee, has wholly failed to comply with any of the provisions of said decree in regard to the sale of said property and has executed a deed and conveyance purporting to grant, transfer and convey in fee simple absolute to Teresa Bell as administratrix etc. of the esstate of Thomas Bell, deceased, the 10,067.2 acre tract of land, and that said grant and conveyance has never been reported to or approved or confirmed by the Court rendering said decree, the validity of said transfer and conveyance by said trustee to one claiming to be a beneficiary though excluded by the decree from any right to receive any part of the proceeds of the sale of the property (which were to go to George Staacke after payment of the S. F. Savings Union) is the real or ultimate question or issue to be decided by this Court. Such a conveyance and transfer of the 10,000 acres without any sale or attempt to sell when the 10,000 acres was admittedly of the value of at least a million dollars and the indebtedness to be paid less than one-fifth of the value of the property was in its very nature an actual and positive fraud upon the U. S. Oil & Land Company, appellant here, for it conclusively appears in and by the findings of fact and adjudicated issues upon which said decree was made and entered that the U. S. Oil & Land Company did have an equity and an equitable right and interest in and to an undivided one-half of said 10,067.2-acre tract and in and to one-half of the surplus proceeds of the

sale thereof after payment of the indebtedness to the San Francisco Savings Union.

Bank of United States v. *Ritchie et al.* 8 Pet. (33 U. S.) *146.*

The very same kind of a transfer and conveyance was made by a trustee without sale and was declared by the Court to be illegal, fraudulent and void in *Bank* v. *Ritchie.*

Kenady v. *Edwards,* 134, U. S. 117, *125.*

The decree in this *later* suit of *Kate M. Bell et al.* v. *S. F. Savings Union et al.* from the time of its affirmance controlled and was conclusive not only as to the several relations, rights and interests of all the parties to it but as to the necessity of a sale, the mode and manner in which the sale should be made, the disposition of the proceeds, and the necessity of a report and confirmation of the sale before the execution of any transfer or conveyance of the property.

The unlawful, wrongful and fraudulent nature and character of such a transfer contrary to the clear and positive directions and commands of said final decree are too obvious to require argument upon a mere statement of the fact that the said 10,067.2-acre tract of land *was of the admitted value of at least One Million Dollars* ($1,000,000) at the time of the pretended transfer and conveyance and of the alleged value of $3,000,000 at the commencement of this suit, and of the fact that the U. S. Oil & Land Company, appellant here, had under said decree in *Bell* v. *San Francisco Savings Union* (the only suit to which it was a party) an interest of an undivided one-half in said 10,067.2-acre tract of land and in the surplus proceeds therof remaining after a sale at public auction in accordance with said decree and the payment of the indebtedness to the San Francisco Savings Union amounting to about $179,400.40 (Tr. p. 120.)

We here in this connection call the Court's attention to the following:

ADMITTED AND INDISPUTABLE FACTS

and beg that the Court will bear them in mind and apply them in determining the rights and interests of the U. S. Oil & Land Company, appellant, under the decree in *Bell* v. *San Francisco Savings Union et al.*

That John S. Bell was the owner in fee simple absolute of the 10,000-acre tract from the 19th day of October 1874 to the 27th day of August 1887, and also from October 19th 1874 until the 18th day of March 1885 was the owner of the 4,000-acre tract; that on March 18th 1885 said John S. Bell conveyed to Thomas Bell said 4,000-acre tract; that on August 23rd 1887 said John S. Bell sold said 10,000-acre tract and said Thomas Bell said 4,000-acre tract to Dwight W. Grover; that Grover failed to pay the part of the purchase price secured by notes and mortgages on said several tracts; that Grover and Rosener (to whom Grover had conveyed an interest) on February 23rd 1888 agreed "*to reconvey said two several tracts of land* (Findings 23 and 24, Tr. pp. 53-54); that said agreement *to reconvey* was accepted by John S. Bell and Thomas Bell, and on March 7th 1889, in pursuance of said agreement, said Grover and Rosener, *by grant* (recorded June 3rd 1889, Book 24 of Deeds, page 495, Santa Barbara County) *conveyed* at the request of said Thomas Bell and *with the knowledge, consent and acquiescence of said John S. Bell* both and each of said two several tracts of land to George Staake, who *PERSONALLY PAID NO CONSIDERATION THEREFOR* (Finding 24, Tr. p. 54); that said Staake was requested by Thomas Bell to receive and accept said conveyance of March 7th 1889 from Grover and Rosener "*with the intent and purpose on the part of both said Thomas Bell and said John S. Bell that said defendant George Staake should HOLD THE LEGAL TITLE* to the lands thereby conveyed for said Thomas Bell, "who should possess, manage administer and control the 4,000 acres as his own forever and also the

10,000 acres until the same should be sold, to the end and in order that from the rents, issues and profits to be collected and received by said Thomas Bell from said 10,000 acres and credited to John S. Bell and from the price for which the same should be sold all present and future indebtedness of John S. Bell to Thomas Bell as provided in the agreement (set forth in Finding 19, Tr. pp. 49-51) between them dated August 27th 1887 (Finding 25 Tr. pp. 55-56); *that on the 28th day of January* 1892 *said Thomas Bell quitclaimed said* 4,000 *acres to George Staake* and on February 1st 1892 said Thomas Bell borrowen FOR THE BENEFIT OF SAID *JOHN S. BELL* from the San Francisco Savings Union $60,000, credited the same to John S. Bell on his account as to the 10,000-acre tract and requested said Staake to make, execute and deliver to the San Francisca Savings Union his (Staake's) promissory note for $60,000, and to make, execute and deliver to Henry C. Campbell and Thaddeus B. Kent a grant of said two tracts of land *"as further security for the payment of said promissory note"* of $60,000 *in addition to the guarantee of Thomas Bell in writing endorsed on said note agreeing to pay both principal and interest according to the terms thereof* with waiver of demand, notice of nonpayment, protest and notice of protest; that said conveyance by Staake to Campbell and Kent was acquiesced in by John S. Bell (Finding 29, Tr. pp. 58-59); hat said Staake, in pursuance of said request, on February 1st 1892 executed a grant of said two tracts of land as one tract of 13,200 acres to said Campbell and Kent, whereby he conveyed to said Campbell and Kent *"in joint tenancy and to the survivor of them, their successors and assigns* the piece or parcel of land" so granted by said Staake to Campbell and Kent, which piece included both of said tracts (describing said piece) (Finding 29, Tr. pp. 59-62); that said grant and conveyance by Staake to Campbell and Kent was upon certain trusts, among which was that upon default in payment of principal or interest and demand of said San Francisco Savings Union said Campbell and Kent might sell such

parts of said lands as was necessary after publication of notice of time and place of sale for three weeks in a newspaper in San Francisco and also at their discretionin a newspaper in Santa Barbara county "*to the highest cash bidder* including, if such should be the case, he holder or holders of said promissory note" of $60,000, and after certain payments mentioned to pay "LASTLY THE BALANCE OR SURPLUS OF SUCH PROCEEDS, IF ANY, TO SAID DEFENDANT GEORGE STAAKE, HIS HEIRS OR ASSIGNS" (Finding 29, Tr. pp. 62-63); that said John S. Bell with full knowledge of said grant and conveyance by Staake to Campbell and Kent "and of the occasion, purpose and terms thereof and of the transaction" acquiesced therein and accepted the credit of the $60,000 to his account (Finding 30, Tr. pp. 64); that said Staake knew of the authority of Thomas Bell to act for said John S. Bell in said transaction of borrowing said $60,000 and executing said conveyance to Campbell and Kent, before said grant was made, "BUT SAID DEFENDANT SAN FRANCISCO SAVINGS UNION HAD NOT NOR DID SAID HENRY C. CAMPBELL OR SAID DEFENDANT THADDEUS B. KENT HAVE ANY NOTICE AT SAID TIME OR UNTIL ABOUT FOUR YEARS THEREAFTER OF ANY INTEREST OF SAID JOHN S. BELL IN SAID PIECE OR PARCEL OF LAND DESCRIBED IN SAID GRANT NOR DID THEY OR ANY OF THEM HAVE NOTICE OR KNOWLEDGE OF ANY FACT OR CIRCUMSTANCE OF SUCH CHARACTER AS TO PUT THEM OR ANY OF THEM UPON INQUIRY OR TO REQUIRE THEM OR ANY OF THEM TO INQUIRE CONCERNING THE SAME" (Finding 31, Tr. pp. 64-65); *that on the* 22*nd day of December* 1896 *by an instrument in writing recorded December 31 1896 in Book 59 of Deeds at page 33 said John S. Bell and George Staacke freely agreed with said San Francisco Savings Union that the security for the payment of said promissory note* of $60,000 "*created by said grant by said defendant George Staake to said Henry C.*

Campbell and said defendant Thaddeus B. Kent should be and remain a first charge on said piece or parcel of land in said grant described (on the entire 13,200 acres—both tracts). (Finding 34, Tr. pp. 66); that thereafter on December 22nd 1896 said John S. Bell conveyed both of said tracts to Kate M. Bell by grant deed recorded June 18th 1897 and thereafter Kate M. Bell and John S. Bell by grant deed dated June 12th 1897 and recorded June 18th 1897 conveyed an undivided one-half of both of said two tracts of land to James L. Crittenden and to Sidney M. van Wyck, Jr.; that thereafter by grant dated March 7th 1899 and recorded November 26th 1900 said Sidney M. van Wyck, Jr., conveyed to said James L. Crittenden all his right, title and interest to or in both of said two several tracts of land and thereafter said James L. Crittenden and Nina D. Crittenden, his wife, conveyed to the U. S. Oil & Land Company said undivided one-half of said two several tracts of land by grant deed dated the 18th day of September 1902 and recorded on the 26th day of September 1902 in Book 84 of Deeds at page 253, records of Santa Barbara county; that by certain conveyances under ersolutions of the Board of directors of the San Francisco Savings Union the Mercantile Trust Compa ynof San Francisco was vested "with *all said title, interests, powers, duties and trusts* * * * and ever since (Nov. 5th 1900) has been and now is the successor and assign of said grantees" (Finding 36, Tr. pp. 68-69); that the total amount due on said $60,000-note was $155,804.67 (Finding 37, Tr. pp. 69-70); "that it was *never understood or agreed* * * * *said first above described of said two several tracts of land* (the 10,000 acres) *or any part thereof should be first sold"* or that the 4,000-acre tract should not be sold unless there was a deficiency after the sale of the 10,000 acres (Finding 39, Tr. pp. 71); "that said action (*Bell* v. *Staacke*) so commenced on the 8th day of March 1893 * * * IS STILL PENDING *in this court and is numbered* 2826 * * * AND THE RELATIONS between said John S. Bell and his grantees of said first above described of said two several tracts of land (the 10,000 acres) on the one hand and said defendants George Staake and Teresa Bell as adminis-

tratrix of the estate of Thomas Bell, deceased, with the will annexed, on the other hand *in respect of said indebtedness of John S. Bell to said Thomas Bell* and in respect of said first above described of said two severaw tracts of land (the 10000 acres) and all or any parts there of ARE INVOLVED *in said action and constitute the subject-matter thereof and* ARE IN COURSE OF *judicial determination and settlement therein''* (Finding 40, Tr. pp. 71;—then, in its conclusions of law, finds and declares *''that this court* HAVING BEEN VESTED BY THIS ACTION WITH JURISDICTION *with respect to said* TWO SEVERAL TRACTS OF LAND FOR THE PURPOSES OF DETERMINING THE ISSUES RAISED HEREIN by the complaint of said plaintiff and the answers thereto retain said jurisdiction FOR THE PURPOSE OF DOING COMPLETE JUSTICE AND DETERMINING COMPLETELY ALL CONTROVERSIES WITH RESPECT TO SAID TWO TRACTS OF LAND and for that purpose take under its direction and control the execution by said defendant Mercantile Trust Company of San Francisco of the trusts created by said grant * * * and direct, instruct and supervise said defendant Mercantile Trust Company of San Francisco in executing said trusts *in accordance with this decision* and ratify and confirm by its orders the execution thereof by said defendant Mercantile Trust Company of San Francisco *in accordance with this decision* to the end that the title of ANY PURCHASER of said *two* tracts of land or of either of them or any part thereof from said defendant Mercantile Trust Company of San Francisco *may be quieted in this action against any and ALL claims of the parties hereto or any of them''* (Tr. pp.72-73); that said Teresa Bell as such administratrix is entitled to judgment that so much of said tract of 13,200 acres as does not include the 4,000-acre tract *be first sold* and the proceeds applied to the payment of the $60,000-note and interest,*''but* SAID DEFENDANT TERESA BELL AS ADMINISTRATRIX OF THE ESTATE OF THOMAS BELL,

DECEASED, WITH THE WILL ANNEXED IS ENTITLED TO NO OTHER JUDGMENT HEREIN" (Tr. pp. 73); that said San Francisco Savings Union, Edward B. Pond, Thaddeus B. Kent, *GEORGE STAAKE* and Mercantile Trust Company of San Francisco are entitled to judgment herein "THAT SAID DEFENDANT TERESA BELL AS ADMINISTRATRIX OF THE ESTATE OF THOMAS BELL, DECEASED, WITH THE WILL ANNEXED *TAKE NOTHING BY THIS ACTION* EXCEPT AS HEREINAFTER ADJUDGED" (the sale of the 10,000 acres before a sale of 4,000 acres), and "that said plaintiffs Kate M. Bell and James L. Crittenden and *said defendant to cross-complaint U. S. Oil & Land Company* take nothing by this action."

The findings in *Bell* v. *San Francisco Savings Union et al.* above-mentioned were not made or filed until *March 14 1905* and that cause was not submitted until the 31st day of October 1904 (Tr. pp. 73, 72)—were not filed until four months and twenty days after the filing on October 26th 1904 of the decision, findings, etc on the so-called second trial of *Bell* v. *Staake* (Tr. pp. 231, Answer of Hammon and Van Deinse *were dated and signed* by the Judge of the Superior Court on the 17th day of October 1904.

The Superior Court on March 14th 1905 made and filed a judgment and decree in *Bell vs. San Francisco Savings Union* (Tr. p. 74-81) wherein "upon the pleadings *and all the other papers heretofore filed and all the proceedings heretofore had in the above-entitled action and in particular upon the decision of this court this day given and filed herein.*" (Tr. p. 74) adjudged "*that the above-named defendant Teresa Bell as administrarix of the estate of Thomas Bell, deceased, with the will annexed,* TAKE *NOTHING BY THIS ACTION except as hereinafter adjudged*" (Tr p. 74) and then adjudged nothing in her favor by said judgment and decree except that the 10,000-acre tract should be sold before a sale of the 4,000 acres (Tr. p. 79); also adjudged that after the sale of one or both of said tracts, as the

case might be, and the payment by the Mercantile Trust Company of San Francisco of the amount due on said note with interest "THE BALANCE OF SAID PROCEEDS, IF ANY," should be paid "TO SAID DEFENDANT GEORGE STAACKE, HIS HEIRS OR ASSIGNS" (Tr. p. 80); also adjudged "that the grant made, executed and delivered" by Staacke to Campbell and Kent dated February 1st 1892 was "A GOOD AN DVALID GRANT of the piece or parcel of land herein described (the 13,200 acres, both tracts) *upon the trusts therein mentioned"* (Tr. p. 75); also ordered and directed the specific manner in which said trusts should be executed by publication in certain named papers in Santa Barbara and San Francisco of a notice of time and place of sale "of the piece or parcel of land in said grant described" (the 13,200 acres, both tracts) and that the sale would be *"at public auction to the highest cash bidder in gold coin of the United States of the standard of* 1892 *in front of the County Court house in said City of Santa Barbara in two several tracts,"* stating the description thereof (Tr. p. 75); also adjudged that said sale be made at said time or at the time to which said sale might be postponed "pursuant to the terms of said notice . . . *and in either case* (the sale of one or both tracts) *thereupon to report its proceedings to this court* AND UPON CONFIRMATION OF SAID SALE OR SALES as the case may be BY ORDER OF THIS COURT TO BE ENTERED UPON SAID REPORT, to make and execute and, upon payment of the amounts bid for the same respectively, to deliver to the purchaser or purchasers, his or their heirs and assigns, a grant or grants of the said tract or tracts of land so sold as aforesaid" (Tr. p. 79).

It appears, and the Court will find by an examination of said purported decision and findings on the so-called second trial of *Bell* v. *Staacke* (Tr. p. 232-242) that every fact and issue of fact purported to be so found were tried and decided on the trial of *Bell* v.

San Francisco Savings Union and were and are included in the findings in that later case; also that it was there found in said purported decision of *Bell* v. *Staacke* "that on August 23d, 1887 plaintiff (John S. Bell) *was the owner of* the tract of land," 10,000-acre tract (Tr. p. 232) and that (Tr. p. 236) George Staacke was under the trust upon which Grover and Rosner conveyed the 10,000-acre tract to him "to convey to the said John S. Bell the said tract of land (the 10,000 acres) or all that remained thereof after the payment of all sums" due to said Thomas Bell by said John S. Bell.

The findings and decree in the later suit of *Bell* v. *San Francisco Savings Union et al.* are, however, under the authorities cited above on page— 8 —conclusive, what ever may be the opinion of the Court as to the validity or invalidity of said purported second set of findings and judgment in *Bell v. Staacke* which, we say and think we have shown, were void and a mere nullity.

It appears as follows fro mthe findings in *Bell* v. *San Francisco Savings Union*:

1. (Finding 29, Tr. p. 58): That "said Thomas Bell by instrument of quitclaim bearing date on the 28th day of January 1892 and recorded in the Recorder's office in Book 33 of Deeds at page 54 on the third day of February 1892 quitclaimed" the 4,000-acre tract to George Staacke;

2. (Finding 29, Tr. p. 58): That said Thomas Bell on the 1st day of February 1892 "borrowed *for the benefit of said John S. Bell* from said defendant San Francisco Savings Union the sum of sixty thousand dollars and credited the same to said John S. Bell on account."

3. (Finding 29, Tr. p. 59) That " as a *part of the same transaction* (the borrowing of the $60,000) said Thomas Bell guaranteed in writing endorsed on said promissory note the payment of said principal sum

and interest according to the terms of said promissory note with waiver of demand, notice of payment, protest and notice of protest . . .

4. (Finding 29, Tr. p. 59) That "*as further security* (in addition to the guarantee) for the payment of said promissory note" the conveyance by Staacke was executed to Campbell and Kent of the entire tract of 13,000 or 14,000 acres, including both tracts of 10,000 and 4,000 acres, so-called;

5. (Finding 25, pp. 55-56). That the conveyance by Grover and Rosener to Staacke was made and received "with the intent and purpose on the part of both said Thomas Bell and said John S. Bell that said defendant George Staacke SHOULD HOLD THE LEGAL TITLE to the lands thereby conveyed FOR SAID THOMAS BELL, who should, possess, manage, administer and control the disposition of said second above described of said two several tracts of land (the 4,000 acres) AS HIS OWN FOREVER, and should also possess, manage, administer and control AS HIS OWN said first above described of said two several tracts of land (the 10,000 acres) with the exception aforesaid UNTIL THE SAME SHOULD BE SOLD to the end and in order that from the rents, issues and profits to be collected and received by said Thomas Bell . . . . and credited to said John S. Bell and from the price for which the same should be sold all present and future indebtedness of said John S. Bell to said Thomas Bell should be repaid to said Thomas Bell in all respects as provided by said agreement between said Thomas Bell and John S. Bell so made and executed between them on the 27th day of day of August, 1887:"

6. (Finding 31, p. 65): That Campbell, Kent, and the San Francisco Savings Union had notice of the interest of John S. Bell in the tract of land (13,200 acres) "*about four years" after the making of said deed* —that is, about February 2nd 1896 and (Finding 34,

Tr. p. 66) thereafter on December 22nd 1896 by instrument in writing John S. Bell and George Staacke *"freely.....agreed with said defendant San Francisco Savings Union"* that the time for payment of said note should be extended until the 22nd day of December 1898 and that the security therefor created by said grant by said defendant George Staacke to said Henry C. Campbell and said defendant Thaddeus B. Kent SHOULD BE AND REMAIN A FIRST CHARGE on said piece and parcel of land in said grant described" (that is, the whole 13,200 or 14,000 acres.)

I wish to call your attention to the above mentioned findings of fact which are sonclusive upon every party to this suit as the conclusiveness and finality of the findings and decree in Bell v. San Francisco Savings Union are admitted by the answers of the defendants

If by written agreement signed by Staacke and by John S. Bell the grant to Campbell and Kent in trust was to "be and remain a first charge on" the 14,000 acres (*both* tracts), and if Staacke then had by and through the grant deed executed to him by Grover and Rosener and particularly by the quitclaim deed executed to him on the 28th of January 1892 by Thomas Bell the entire title, legal and eqitable, of in and to the 4,000-acre tract, *then this written agreement of December 22nd* 1896 *bound the entire* 14,000 *acres,* shut Thomas Bell his heirs, executors and admintrators out by transferring to Staacke and vesting in him all of Thomas Bell's rights and interest made every right, title and interest of John S. Bell in and to the 10,000-acre tract of John S. Bell and George Staacke, the then equitabl ownr of the 4,000 acre tract subject to the trust deed executed by Staacke to Campbell and Kent, and acknowledged and established and equity to the 10,067.2 acres in John S. Bell subject to the trust deed to Campbell and Kent.

We ask this Court's special attention to said abovementioned Finding 34 in Bell v. San Francisco Savings

Union (Tr. p. 66-68) and to said written agreement found to have been entered into by John S. Bell, George Staacke and the San Francisco Savings Union on the 22nd day of December 1896 and recorded on the 31st day of December 1896 in Book 59 of Deeds at Page 33. The written agreement of December 22nd 1896 so recorded in said Book 59 on the 31st day of December 1896 was signed and executed under seal and also duly acknowledged by said San Francisco Savings Union, George Staacke individually, George Staacke, trustee, George Staacke and Jno. W. C. Maxwell, executors of the will of Thomas Bell, deceased, and by John S. Bell, and stated and declared

"This indenture, made this Twenty-second (22nd) day of December, 1896, between the San Francisco Savings Union, a Corporation, party of the first part, John S. Bell, party of the second part, George Staacke, in his own behalf and as Trustee in the premises for said John S. Bell and for the estate of Thomas Bell, deceased, and for the Executors of his will, and for Teresa Bell, widow, and Thomas Frederick Bell, Mary Teresa Bell, Robena Bell, Muriel Bell, Reginald Bell and Eustace Bell, children and heirs of said Thomas Bell, deceased, as their interests may appear, parties of the third part, and George Staacke and John W. C. Maxwell, Executors of the Will of said Thomas Bell, deceased, parties of the fourth part:

"Whereas, on the First (1st) day of February, 1892, *the said George Staacke, who then appeared and was by said party of the first part believed to be the owner in free in his own right of the lands described in the deed of trust hereinafter referred to,* borrowed from said party of the first part the sum of sixty thousand dollars ($60,000.00) and executed and delivered to the party of the first part therefor his promissory note for said sum, of which the following is a true copy, to-wit: (then sets forth the note at length and the guarantee thereon signed by Thomas Bell).

"And whereas, to secure the payment of said note, said George Staacke executed and delivered to Henry C. Campbell and Thaddeus B. Kent, as parties of the second part, and said San Francisco Savings Union, as party of the third part his deed of trust of even date with said note, conveying certain lands situate in the County of Santa Barbara, State of California, for the description of which special reference is made to said deed of trust and to the record thereof, the same being of record in the office of the County Recorder of the County of Santa Barbara, State of California, in Liber 33 of Deeds, at pages 56 and following (then sets forth recitals of other matters).

"Now, therefore, in consideration of the premises and in pursuance of said judgment and decree, it is *mutually covenanted and agreed..... that said deed of trust shall be and remain a FIRST charge on the lands therein described, to secure the payment of said note,* PRIOR AND SUPERIOR TO ANY CLAIM, CHARGE OR LIEN THEREON IF THE PARTIES OF THE SECOND, THIRD AND FOURTH PARTS RESPECTIVELY, OR ANY OF THEM; . . .

"In witness whereof, the party of the first part has caused this instrument to be executed by its President thereunto duly authorized, and its corporate seal to be affixed, and the parties of the second, third and fourth parts respectively have hereunto set their hands and seals, the day and year first above written."

This remarkable agreement or indenture proves by its very terms and signatures that it was entered into and executed by every person and corporation then interested in any manner in said 14,000-acre tract of land or any part thereof, and its validity being distinctly found and declared in and by said finding it is conclusive upon all parties to it and upon the whole tract of 12,000 or 14,000 acres. It necessarily made John S. Bell and his rights and interests subject to said loan and to said trust deed executed to Campbell and Kent to secure the same, and made the San Fran-

cisco Savings Union and Campbell and Kent and every party to said agreement and indenture not only a necessary but indispensable party to any suit affecting said entire 13,000-acre tract of land or any part of it, for it declared "*that said deed of trust* (to Campbell and Kent *shall be and remain a first charge on the lands therein described, to secure the payment of said note,* PRIOR AND SUPERIOR TO ANY CLAIM, CHARGE OR LIEN THEREON OF THE PARTIES OF THE SECOND, THIRD AND FOURTH PARTS RESPECTIVELY, OR ANY OF THEM."

The writer of this brief, Mr. Crittenden, when the existence of this indenture or agreemnt was first disclosed to him in June 1897, on the trial of Bell v. Staacke, a few days after he first appeared in that suit urged upon the Court and subsequently moved that the San Francisco Savings Union, Campbell and Kent, trustees, and all parties to said agreement or indenture were *indispensable* parties in the action of Bell v. Staacke and should be brought in by order of the Court as parties defendant, as their rights and interests were involved and no final decree as to any part of the land could be made without their being made parties. The defendant's attorneys opposed the motion and prevailed upon the Court to deny it.

A copy of said indenture or agreement dated the twenty-second day of December 1896 was introduced in evidence by the plaintiffs represented by Mr. Crittenden on the trial of the action of *Kate M. Bell et al* v. *San Francisco Savings Union et al.,* and will be found on pages 635-643 of the Transcript on Appeal. This indenture of December 22nd 1896 by its very terms was executed by George Staacke "in his own behalf AND AS TRUSTEE IN THE PREMISES FOR SAID JOHN S. BELL," and was therefore an admission and declaration by all parties to it that John S. Bell had an interest in the tract of land described in the trust deed to Campbell and Kent, also that George Staacke was trustee for John S. Bell of some equity or trust of

which John S. Bell was a beneficiary, also that George Staacke was acting in part "in his own behalf" as an individual and doubtless under the quitclaim deed executed to him by Thomas Bell conveying the 4,000-acre tract of land.

If said quitclaim deed of Thomas Bell to Staacke passed and transferred anything to Staacke, it must have transferred all legal and equitable right, title, interest and claim of every kind and character of Thomas Bell to George Staacke, and neither the decree in Bell v. San Francisco Savings Union nor the findings therein show that Thomas Bell ever thereafter acquired any interest in or to the 4,000-acre tract or any part thereof, and, therefore, there never could have been any right on the part of the administratrix to pay the amount due and take a deed of any of the 14,000 acres, for that right, if it existed in anyone, must have been in George Staacke and George Staacke must by and under the deed from Grover and Rosener and under said quitclaim conveyance from Thomas Bell have succeeded not only to the legal title but tothe equitable right or claim to hold the 10,000 acres, manage, administer and control the same and to pay off any indebtedness due Thomas Bell, that is, George Staacke individually and John S. Bell's successor in interest, U. S. Oil & Land Company, were the only persons that held the right to pay off the indebtedness due the San Francisco Savings Union, if such right existed after the decree was entered in *Bell* v. *San Francisco Savings Union.* Again, under the written agreement made by Staacke and John S. Bell with the San Francisco Savings Union on the 22nd day of December 1896 both Staacke and the San Francisco Savings Union bound *the entire* 14,000 *acres and gave John S. Bell an equity by acknowledging at that time an equitable right and interest in him and making the entire* 14,000 *acres and the trust in Campbell and Kent subject to his* equity, and thereby made the San Francisco Savings Union and its trustees *indispensable* parties to

any suit affecting the 14,000 acres or John S. Bell's interest therein, *indispensable* parties to ~~any~~ suit of Bell v. Staacke.

The legal title to the entire 13,000 or 14,000-acre tract was,according to the finding of the Court, transferred and conveyed to Staacke by Grover and Rosener with the consent of both Thomas Bell and John S. Bell to be held by Staacke in trust for John S. Bell and Thomas Bell as beneficiaries. George Staacke, according to said indenture of December 22nd 1896 and the finding of the Court, borrowed $60,000 from the San Francisco Savings Union and as absolute owner in fee of said 14,000-acre tract granted and conveyed the same to Campbell and Kent in trust as security for the payment of the $60,000, concealing from them and the San Francisco Savings Union the fact that he was not the owner in fee in his own right of said tract and also concealing the trust upon which he had received the same,thereby inducing said Campbell and Kent and the San Francisco Savings Union to believe that he was the absolute owner in fee in his own right of said land, then, four years afterwards, the San Francisco Savings Union and Campbell and Kent, according to the findings of the Court, discover that they have been imposedupon and decieved and exact or obtain from all the parties interested inthe proptrty this indenture or agreement of December 2nd 1896. Surely as bona *fide* and innocent mortgages of the entire tract the absolute title, legal and equitable, to said 14,000 acres passed to and was vested in said Campbell and Kent as trustees for the San Francisco Savings Union, free and clear of every legal, equitable or beneficial interest in or to any part of the same on the part of Thomas Bell and John S. Bell, especially as the Court finds that before the loan was made Thomas Bell conveyed by quitclaim the 4,000 acres to Staacke and that the money was borrowed by Staacke as owner in fee of the entire 14,000-acre tract and was borrowed for the benefit of John S. Bell and credited to his account with

Thomas Bell. No equity or beneficial interest of either Thomas or John S. Bell to any of the 14,000-acre tract could arise until after a reconveyance by Campbell and Kent to Staacke or a sale and the payment of the surplus proceeds to Staacke, and then only because equity would again enforce the original trust upon which it had been conveyed to Staacke by the deed of March 7th 1889. No sale of the 14,000-acre tract or any part of it could be made after said indenture of December 22 1896 was executed, except by the trustees of the San Francisco Savings Union, for they held the entire legal title in fee simple in trust for the San Francisco Savings Union as sole beneficiary of the trust upon which it was conveyed to them.

It clearly appears by the briefs of appellees and by the record and the decision (tr. pp. 291-6) of the District judge that the *sole and only question or issue heard by the district court was the sufficiency of certain alleged judgments of the state courts pleaded by the answers of certain defendants as a defense* to the Bill—a defense in the nature of a plea in bar,—that said issue or special defense was to "be separately heard and disposed of *before the trial of the principal case*" (p. 291) —that the sufficiency of the Bill, its equities and merits were not tried, heard or submitted to the court for decision,—that the court had already overruled all demurrers to the Bill (pp. 174-6), and denied motions of defendants for judgment on the pleadings (p. 226), —had held (p. 175) that 'complainant had no adequate remedy at la win the courts of the United States,' that complainant had not been guilty of laches, and its claim of title and equity were not stale or barred by the Statute of Limitations, and that the Bill was sufficient on its face to entitle the complainant to equitable relief.

It further appears by the record taht the district court in deciding the *special defense* has attempted to decide and dispose of all facts, matters and equities alleged in the Bill without any trial or hearing thereof

and without any opportunity to complainant to be heard or offer evidence or try any of the issues raised by its bill, although it was distinctly and clearly understood as stated by it in its decision that said *special defense* was to "be *separately* heard and disposed of *before the TRIAL of the PRINCIPAL case.*" (p. 291),—that the solicitors for defendant's, or, Mr. Goodrich with the consent of the others, (Goodrich's Affidavit p. 316) prepared a decree in favor of defendants in which was inserted and embodied a recital of a stipulation and admission by complainant obviously so worded and designed as to prejudice and impair or defeat the rights of complainant on any appeal taken by it and so unfair and untrue in fact that the court, after refusal of defendant's solicitors to consent thereto, on motion of complainant ordered said recital corrected and said decree modified.

The correction of said recital by the court proves its unfairness, and the refusal of the solicitors of defendants to consent to any correction or modification illustrates the real purpose, intent and design of said solicitors in preparing and inserting such recital in the decree and in not submitting it to any of the complainants solicitors or counsel.

The solicitors for defendants carefully omitted from said recital (doubtless with the same purity of intent) any statement of the stipulation and admission made by *them* in open court on said hearing quoted from his and Mr. Crosby's brief by Mr. Blakeman in his affidavit (p. 306) to-wit: "It was *stipulated by the respective counsel herein* in open court preceding the oral argument that the findings and judgment in *Bell* v. *Staacke* of June 29, 1901, and the findings and judgment in*Bell* v. *San Francisco Savings Union, were substantially correct as set forth in the Bill of Complaint,* and that the subsequent proceedings in that action and in *Bell* v. *San Francisco Savings Union WERE SUBSTANTIALLY CORRECT* as set forth in the answers of defendants."

The Judge, on the hearing of the motion to correct

the recital in the decree, stated that *the solicitors for defendants had joined* in the stipulation referred to in the decree and that he would have that fact stated in the order he would meke in correcting the recital. Yet he never did it– Why? Did the defendant's solicitors again devise and form the modification of said recital? Are conscience and truth so far removed from the courts of equity that they no longer insist upon verity in their records?

Still more illustrative of the fairness and the purity of intent and purpose of said recital is the remarkable sworn statement (p. 318) of Mr. Goodrich:

"That the said decree *is clear and unambiguous; that the same does not, expressly, impliedly, necessarily or at all adjudge that the complainant stipulated to the validity of the said judgments or acts,* but declares that the complainant stipulated, as was the fact, that the said judgments were rendered and the said acts performed; that any modification of the decree as suggested by complaint would render the same ineffective for any purpose and would result in the travesty of justice; *that if there were any possible ambiguity in the said decree and if there were any disposition, or any attempt made, by any person, to claim that the decree recited a stipulation on the complainant's part to the validity of the said judgments and acts,* the whole recodd in the cause, including the opinion of the court, the briefs of counsel, *AND THIS AFFIDAVIT, would show conclusively and without shadow of doubt that the complainant never admitted the validity of the said judgments or acts* and *that the whole question repeatedly and at length argued before the court in this cause was the very question of the validity of such judgments and acts.*"

The solicitors for complainant have deemed it their duty to prefer a correction of the decree to the modest suggestion made by Mr. Goodrich in his affidavit (p. 318) that complainant leave to *his affidavit* and the Record any doubt or future difference as to the meaning or effect of said recital. It seems that he or his associate solicitors or some other person, reason or matter un-

disclosed and unknown to complainant or to its solicitors or counsel, prevented the judge from making the correction in said recital which he stated on the hearing he would make. We must so assume or assume that a new light was shed by some one upon the matter *after* argument and submission. What light or by whom we know not, but the solicitor who argued said motion for complainant, Mr. Crittenden, cannot after more than forty years practice in the Federal Courts consent to remain silent when his client's rights and interests have been so treated and jeopardized. The controverted stipulation (whatever its terms) was made, as stated by the judge on the hearing, *by the solicitors of all the parties before the court* and not solely by the solicitors for complainant. The very nature of the matter shows this, for it would be absurd for complainant to admit or stipulate as to the correctness of findings and judgments set forth at length in its verified bill, as the court would only accept proof or an admission from defendants as to the correctness thereof. Why was the correction not made so that the recital would state the truth and the verity of the decree and record be placed beyond doubt.

We trust that we may be pardoned a little skepticism as to the truthfulness of the affidavit of a solicitor who so audaciously and recklessly *swears* (p. 318) as to the only possible meaning and construction of said recital,—whose affidavit conflicts with the statement made by Mr. Blakeman and Mr. Crosby in their brief on said motion written within six weeks after the hearing on said special defense (see Blakeman's affidavit tr. p. 306),—who states on oath as a fact (p. 311) that on the 11th day of November 1912 at the argument of the demurrers to the bill the complainant was represented by Mr. Crittenden and Mr. Carrier and "that in reply to the argument of the said T. Z. Blakeman *the said solicitors for complainant* then and there admitted the existence of the said judgments but contended and argued that the same could not be taken cognizance of"

etc., *though Mr. Crittenden was not there, made no such admission, and was more than* 450 *miles from said court and hearing at that time* (tr. p. 320) This fact is proved beyond the possibility of doubt by Mr. Crittenden's affidavit in reply (p. 320) which was not contradicted and was within the actual knowledge of Judge Rudkin.

The court (p. 323) as a result of said motion *did correct* in part said recital "*nunc pro tunc as of July* 21, 1913," the date of the entry and recording of the decree (tr. p. 297), but later on the same day after the adjournment of court and in the absence of complainant's solicitors and counsel, Mr. Goodrich, for defendants alone being present, made another order (p. 324) "that the motion to modify said decree be, and the same is hereby denied, except as to the matters and things covered by *the amendment to said decree* this day signed and filed herein."

The decree *as modified* is therefore before this court and necessarily brings with it said order modifying it and the decision as to the motion upon which the modifying order was made. This is so, we submit, under the well settled rules, principles and practice of courts of chancery, where on appeal from a decree all matters and proceedings upon which it or any of its provisions or recitals are based are subject to review as fully as if they had transpired or had been in the appellate court. We know of no provisions of the United States Statutes or of any rule of this court requiring an appeal to be taken from any such order or requiring a bill of exceptions thereto, and respectfully submit that there is no such law or rule.

Again we ask why was said recital not corrected and said decree thereby modified so as to show the stipulation and admission made by the solicitors for defendants "*that the findings and judgment in Bell* v. *Staacke of June* 29, 1901, *and the findings and judgment in Bell v. San Francisco Savings Union were substantially correct* as set forth in the bill of complaint

(Blakeman's Affidavit tr. p. 306), and so as to show of record the reciprocal admission and stipulation for that made on the part of the complainant?

Was this omission designed to prevent complainant from obtaining a final decree on appeal in the event of its being held and decided on appeal that the first judgment in Bell v. Staacke dated June 29th 1901 was final, or decided on appeal that the findings and judgment in the later action of Bell v. San Francisco Savings Union in which all of the parties to Bell v. Staacke and everyone interested in the property, including the U. S. Oil & Land Company (appellant here) was made a party, and in which every fact, matter, issue, right, title and equity involved in the prior acton of Bell v. Staacke (including *ALL THE RELATIONS BETWEEN JOHN S. BELL AND HIS GRANTEES ON THE ONE HAND AND GEORGE STAACKE AND TERESA BELL AS ADMINISTRATRIX, etc. ON THE OTHER HAND* in respect of the indebtedness of John S. Bell to Thomas Bell and in respect of both tracts of land and all parts thereof, findings 4 to 34 inclusive, and 39 in Bell v. San Francisco Savings Union et al) was LITIGATED AND DECIDED,—was conclusive and binding as to the rights, titles, interests and equities of all parties irrespective of and despite all proceedings or purported proceedings in Bell v. Staacke after said first judgment therein? If omitted with such a design or intent we say none of the defendants can avail themselves of the omission, for none of the defendants except those represented by Mr Blakeman and Mr. Crosby have denied or controverted by their answers the allegations of the bill as to said find ings and judgments, and the defendants represented by Mr. Blakeman and Mr. Crosby are all bound by the stipulation made by their solicitors in open court as stated in Mr. Blakeman's affidavit on page 306, for conscience and equity in Courts of Chancery do not permit or tolerate the repudiation of or the slightest deviation from such an admission and stipulation in open court

especially when by it a reciprocal admission or stipulation has been obtained from the opposite party and has been acted upon.

All the court could do in Bell v. Staacke was to adjudge that a lien existed in favor of Tom Bell and the amount of the indebtedness—but it could not adjudge or order any sale, as the lien itself had passed by Staacke's deed to Campbell and Kent in trust to secure the bona fide loan made by the San Francisco Savings Union, it could not order, adjudge or decree a sale of the 10067.2 acres or of any part thereof, as the entire legal title thereof had passed to Campbell and Kent by the deed from Staacke and the equity of the San Francisco Savings Union was by the acts of both John and Thomas Bell made superior to and entitled to a priority over any and every right or equity of either and both of them, for John had in writing ratified Staacke's conveyance to Campbell and Kent and the $60,000.00 loan, and Thomas had conveyed to Staacke by quitclaim all of the 4000 acre tract and had guaranteed the loan and its payment.

The suit of Bell v. San Francisco Savings Union is radically different in many matters from Bell v. Staacke, but involves and includes all issues in Bell v. Staacke.

The Supreme Court in Kate M. Bell et al. v. San Francisco Savings Union et al., 153 Cal., 64, 66, in rendering its decision on the appeals from the orders denying both motions for a new trial, says:

> "Prior to the conveyance to Campbell and Kent *the legal title to this property was vested in George Staacke.* Staacke claimed no beneficial interest whatever, *but was holding purely as a trustee.* (p. 66.) * * * The U. S. Oil and Land Company, claiming as a successor in interest to the plaintiff, James L. Crittenden, was brought in by amendment as an additional defendant to the cross-complaint. By the various

> answers to hte cross-complaint, the parties representing the John S. Bell interest *and the Thomas Bell interest RAISED SUBSTANTIALLY THE SAME ISSUES AS THOSE WHICH HAD BEEN RAISED BY THE PLEADINGS heretofore discussed,* and in addition it was pleaded that the note held by the San Francisco Savings Union was barred by the statute of limitations and that the right of the cross complainants to any affirmative relief was barred by limitation." (p. 67).

The court also held that it, the Supreme Court, had no jurisdiction of the appeals by reason of the failure to serve Staacke who had died with notices of the several appeals from the judgments and orders denying new trials, and says:

> "The service of notice of appeal has a two-fold purpose—first, to give the appellate court jurisdiction of the person of the respondent, and second, *to give the appellate court jurisdiction of the subject matter of the appeal.* Jurisdiction of the person may be conferred by a voluntary appearance at any time, *but inasmuch as jurisdiction of the subject-matter can never be conferred by consent,* the voluntary appearance by the respondent must be made within the time in which a service of notice upon such respondent would be effectual to vest jurisdiction of the appeal in the appellate court. (p. 70-71.)

The court in its decision, referring to the motions for a new trial under section 659 of the code of civil procedure says:

> "In so far as the proceeding for a new trial is a "new statutory proceeding, collateral" to the main action, (Fowden v. Pacific Coast S. S. Co., 149 Cal. 151, 86 Pac. 178),) the parties to such collateral proceeding are determined by the notice, *and the jurisdiction of the parties, other than the moving party, is obtained by the service upon them of such notice."* (p. 69)

Sloss, J., in his opinion, after stating that the Supreme court had no jurisdiction, makes an inaccurate and incorrect reference on page 74 to a finding (finding No. 40) of the lower court in the record of which the court held it had no jurisdiction, whatever over the subject-matter of that suit or over any of the parties thereto.

The court clearly held that it had no jurisdiction either of the appeal from the judgment or the order denying a new trial, but purported to modify the decree in so far as to the amount allowed as interest on the note on the ground that such modification was not injurious to and could not affect George Staacke—affirmed the order denying both motions for a new trial and denied the motion to dismiss the appeals from said orders.

The decision in Casey v. Jordan, 68 Cal. 246, cited on page 74 of the decision, is not in point and does not sustain the statement that "the finding as to the pending action (which is not attacked) clearly made it the duty of the court to reserve for adjudication in that action (Bell v. Staacke) the maters herein involved." (p. 74.

In *Casey* v. *Jordan,* 68 Cal., 246, cited on page 74 of the decision, is not in point and does not sustain the statement that "the finding as to the pending acion (which is not attacked) vlearly made it the duty of the Court to reserve for adjudication in that action (*Bell* v. *Staacke*) the matters therein involved." (pp. 74.)

In Casey v. Jordan, 68 Cal., 246, two days after a void order order of dismissal of a former action between the same parties identical with the later action (Heinlin v. Castro, 22 Cal., 102) the later action was commenced and judgment was rendered therein in favor of the defendants. Judgment in the former action was also rendered. The Court held "It should only have have adjudged that the action

abate'' instead of giving judgment in favor of defendants and directed such modification of the judgment. Decided in Department 1 by Ross, Jutsice, McKee and McKinstry, Justices, concurring.

> The Court in Bell v. S. F. S. Union, pp. 72, says: ''But, while the court may review the action of the lower court in figuring interest on the sixty-thousand-dollar note, we think the judgment and order appealed from cannot be reversed, nor can it be modified in any other particular without detriment to the interests of Staacke or his estate.'' It decided to retain for that purpose only the appeals from the orders and the judgment. (pp. 71-72.)

The learned solicitors for Hammon and Van Deinse (defendants who claim to be the purchasers for value and admit notice and knowledge of all the records and of facts and matters which put them upon diligent inquiry and gave them notice of all that could have been discovered by such inquiry (Tr. pp. 288-261, *288*) are mistaken in making the statement on pages 25-26 of their brief that the Supreme Court of the State in Bell v. Staacke, 137 Cal., 307, on September 16th 1902 by its decision changed the well settled rule that a notice of intention to move for a new trial was premature and ineffectual for any purpose or to confer jurisdiction if served or filed before the last findings of fact and conclusions of law were made and filed, and also mistaken in asserting on page 26 that the U. S. Oil & Land Company's purchase of said land was ''at least two days after'' a change of said settled rule of construction of the statute. Their statements are so misleading that we deem it our duty to call the Court's attention to them and to the fact that the Supreme Court of the State in the very language quoted by counsel on pages 25-26 intimates that the settled rule would not be departed from by stating ''A FAILURE TO SERVE SUCH A NOTICE AT ALL MIGHT BE A GOOD REASON FOR DE-

changed or purported to change the settled rule of construction of said section 659,

NYING THE MOTION," and then merely holds, as it had uniformly held, that a party's right to appeal from such an order was not thereby defeated and that it did not constitute a reason for dismissal upon the ground that the Court had no jurisdiction *to hear* such an appeal. The Supreme Court of the State never until November 3rd 1903 when it attempted to reverse the order denying a new trial after the same had been affirmed and after the judgment had been affirmed.

The same learned solicitors are mistaken in their statement of the effect of the decision in Cross Lake Club v. Louisiana, 224 U. S., 662.

The decision of the Court in Cross Lake Club v. Louisiana, 224 U. S., 632, did *not* involve and does *not* decide the question as to the settled construction of a statute and contract made long after such settled construction had become in effect a part of the statute itself. On the contrary, the construction of the statute under question and involved in that suit had been uniform and as given and applied in the suit. A statute of 1892 and the question whether by its terms it conveyed certain lands were the only issues in the case. The later statute of 1902 that should have been objected to was not questioned or made an issue in the *nisi prius* court or in the Supreme Court of the State, and the Supreme Court of the United States says:

> "Under the construction given to the Act of 1892 the state still held the title, no conveyance having been made to the Board of the Levee District, and of course the right to maintain the suit was appurtenant to the title. What has been said sufficiently demonstrates that no effect whatever was given to th Act of 1902, *and therefore, that the case presents no question under the contract laws of the Constitution;* and as there is no suggestion of the presence of any other Federal question, the writ of error is dismissed."

It is obvious, therefore, that the only question in the United States Supreme Court was that of jurisdiction, and also that there was no question involving the settled construction of a statute or that the decisions of the state courts were not in accordance with that settled construction; and, therefore, the construction of the statute by the state courts could not have impaired the obligation of the contract involved, as the decision was in accordance with the settled construction and also in accordance with the Act or statute of 1892. The language italicized on pages 28-29 of the brief for appellees Hammon and Van Deinze is utterly inapplicable to the question now before this Court. The Courts of the United States had no jurisdiction in the case because there was no Federal question, no settled construction of a statute involved, no subsequent law or statute impairing the obligation of a contract, and no decision of the Court in conflict with the law as settled by a long line of decisions; but if the Court had had jurisdiction, as in the case at bar, it would have and must have decided any question involving the impairment of the obligation of the contract. The Supreme Court does not cite review or purport to overrule any of its former decisions cited by this appellant.

There is no question here as to the jurisdiction of this Court over the subject-matter and the parties, or as to jurisdiction being conferred by impairment of contract. The law as to impairment of contract obligation to be applied here by this Court is, under the Constitution and laws of the State of California, as well as under the laws and Constitution of the United States. The Constitution declares (Article I, Section 16, State Constitution):

" . . . no *ex post facto* law, *or law impairing the obligation of contracts,* shall ever be passed."

And the Supreme Court of this State has held for more than half a century (1) that the uniform construction of a statute by decisions of the Supreme Court becomes in effect a part of the statute itself and

any contract made while such construction of the statute is in force is valid and cannot be defeated either by any subsequent statute or any subsequent decision of the Supreme Court or any other court placing a different construction on the statute.

The same learned counsel are mistaken in urging upon this Court that the U. S. Oil & Land Company had permitted a final judgment against it to remain of record without questioning its validity (pp. 62-63 of their brief) and immediately thereafter (on page 63) call the Court's attention to the commencement of two suits, one in 1910 and one 1911, in the Superior Court of Santa Barbara County in each of which the judgments against it were disputed and put in issue and relief was sought against them, substantially as is sought in this suit. These solictors leaped outside of the record in calling attention to these suits, as the complaints therein were not introduced in evidence and no admission was made as to them. If they had been disposed to be fair in the matter and had not intended to attempt to mislead or prejudice this Court by referring to said suits and the voluntary dismissal thereof by the U. S. Oil & Land Company, plaintiff therein, they would have stated the reasons why said dismissals were made by the U. S. Oil & Land Company, namely, that certain defendants, those represented by Mr. Blakeman and Mr. Crosby, appeared in each suit within a few days after the commencement thereof and prevailed upon the Court to set the same for trial before other defendants, who were material and necessary parties, could be served with summons and complaint, and the plaintig and Mr. Crittenden, one of its attorneys, became satisfied that it could not have a fair and impartial trial in that court and also that it would be put to great expense in separate trials against different defendants. It was also hoped and expected at the time of the dismissal of each of those suits that the commencement thereof and the *lis pendens* recorded in each suit would put such speculators as Hammon and

Van Deinse upon notice as to the rights and interest of the U. S. Oil & Land Company and as to its determination to deny and assail the jurisdiction of the Courts in said suit of Bell v. Staacke after the first judgment therein, and to assert its title despite any such judgments in said suit of Bell v. Staacke and any claim of Teresa Bell as administratrix based upon the transfer and conveyance made to her by the Mercantile Trust Company, or based upon any pretended sale under any such judgment in Bell v. Staacke. There were other reasons that influenced Mr. Crittenden in dismissing said suits, which he deems it unnessary to present here as they might wound the feelings of persons who are not parties to this suit and can, in his judgment, have little or no bearing or effect upon the decision of this suit or any matter in it, but if the court deems they may have he is ready and willing to dis close them. These two suits commenced in 1910 and 1911, with the *lis pendens* filed in each, gave clear and positive notice of the assertion of title by the U. S. Oil and Land Company, also of its denial of any effect upon its title resulting from any such judgments in Bell v. Staacke, and refute unqualifiedly the statement of said appellees' solicitors.

The same solicitors do not hesitate to broadly and deliberately misstate the position and contention in this suit of the solictors and counsel for appellant by stating (p. 63 of their brief) "The theories they now advance have been held and advanced by them for twenty years" and supplement it by adding untruthfully the statement that "Those theories, as well as the appellant, have had their day in court," for it is almost incredible that attorneys who have been so long engaged in the practice of law and one of whom has adorned the state superior bench could have read the Bill in this suit without discovering and knowing that the issues presented by it and now before this court have never been submitted to, tried or decided in any court and that the so-called "theories"—meaning, doubtless, the great principles of equity jurisprudence laid

down in the numerous decisions of the Supreme Court of the Unted States cited by us—could not have been advanced by Mr. Crittenden or either of the counsel in this case for twenty years in any part of the litigation. We readily admit that all of the solicitors and counsel for appellant have for more than twenty years understood and relied upon the great principles of jurisprudence cited by them, knowing them to have been declared and sustained by the most eminent jurists of the United States and of Great Britian.

These same solicitors finally (pp. 64-67 of their brief) urge the judgments in Bell v. Staacke and Bell v. San Francisco Savings Union as *res adjudicata* or a bar to appellant's recovery, and modestly suggest that they have put a cart of sixty-three pages before their horse of *res adjudicata* of three pages, and cite decisions in cases so radically different that they have, we submit, no bearing upon the questions here presented. The facts and issues in said cases being radically different the language quoted is inapplicable to the case now before this court. No court has ever yet held, we submit, that *res adjudicata* could arise or be based upon a judgment or order made by a court without jurisdiction or where a trustee in violation of the positive commands and provisions of a decree has transferred or attempted to transfer by conveyance to one beneficiary or pretended beneficiary of a trust the rights, interest or equity of another beneficiary of the trust. Chief Justice Marshall, in the case of Bank of the United States v. Ritchie et al., in an opinion unanimously concurred in by all of the justices of the Supreme Court *of the* United States, which we have above cited and quoted from, settled this question several generations ago, and that decision has never been questioned, but has always been recognized and followed as a settled principle by the Supreme Court of the United States.

The contention on the part of appellees that this suit as a collateral attack upon the judgment in Bell v. Staacke is, we think, not seriously intended, for it is

not possible to imagine a more direct and positive attack than that made by the bill of complaint in this suit assailing the jurisdiction and authorty of the court in all proceedings after the entry of the first judgment. That such an attack is direct and .may be made needs no citation of authorities, and we merely refer the court to authorities cited above on page 7 and to

Williamson v. *Berry,* 49 U. S. (8 How.) 495, 540-541.

The contention of appellees that the judgment and decree in Bell v. San Francisco Savings Union, the later suit, does not conclude and prevail over the so-called second judgment in Bell v. Staacke is met by the fact that it appears clearly from record that said so-called second judgment in Bell v. Staacke was made on the 17th day of October 1904 and filed on October 26th 1904 (tr. p. 242), and the suit of Bell v. San Francisco Savings Union was not submitted to the court until the 31st day of October 1904 (tr. p. 42), and was not decided until March 14th 1905 (tr. p. 73) and judgment was entered on the same day (tr. p. 81)—also by the fact as stated by Mr. Blakeman, that the pendency of the suit of Bell v. Staacke was alleged in an amendment to her answer filed by Teresa Bell as administratrix—and by the fact that no motion or application was made to the court in Bell v. San Francisco Savings Union either to continue the trial of that later suit or to abate it, though the defendants had ample time to make such a motion or application—and by the further and conclusive fact that the court in the later suit of Bell v. San Francisco Savings Union by its third conclusion of law (tr. p. 72) passed upon the matter of the pendency of the suit of Bell v. Staacke by declaring "this court having been vested by this action with jurisdiction with respect to said two several tracts of land for the purposes of determining he issues raised herein by the complaint of said plaintiff and the answers thereto retain said jurisdiction for the

PURPOSE OF DOING COMPLETE JUSTICE AND *DETERMINING COMPLTTELY ALL CONTROVERSIES WITH RESPECT TO SAID TWO TRACTS OF LAND* and for that purpose take under its direction and control the execution by said defendant Mercantile Trust Company of San Francisco of the trusts created by said grant so recorded in the office of said Recorder of the County of Santa Barbara in the state of California in Book 33 of deeds at page 56 as aforesaid * * * * " (tr. p. 73).

By this solemn indenture of Dec. 22 1896 under seal all parties interested not only ratified and confirmed the original transaction by which Staacke granted and conveyed to Campbell and Kent the 14,000 acres and the absolute title in fee simple as owner thereof in his own right (Civil Code, sec. 1105, 1104, 1106, 1107) in trust as security for the payment of $60,000 borrowed by him from the San Francisco Savings Union on his promissory note, and made the San Francisco Savings Union the sole beneficiary of that trust, leaving in Staacke only an equity as to any balance of the proceeds resulting from any sale of the land after payment of the indebtedness to the San Francisco Savings Union. The position of the parties in interest after the said transaction was consummated was identical with that stated in this indenture by reason of the vesting of the absolute title to the property of record in Staacke, if the San Francisco Savings Union was an innocent and *bona fide* incumbrancer as found by the Court, for Thomas Bell and John S. Bell were responsible for the absolute conveyance by Grover and Rosener to Staacke and thereby enabled Staacke to consummate said transaction. But by said indenture they expressly declared and made any and every equity, right and claim on the part of any of them subsequent and inferior to said deed of trust executed to Campbell and Kent and made said trust deed and the beneficial interest thereunder of the San Francisco Savings Union "prior and superior to any claim, charge or lien thereon of the parties of the second, third and fourth parts

respectively, or any of them." The equity of Staacke only was left to protect any rights, interests or claims of John S. Bell and Thomas Bell, the executors and heirs of Thomas Bell, George Staacke individually and as trustee for John S. Bell and as trustee for the heirs of Thomas Bell, and that equity was, by reason of the ratified transaction, an equity as to the entire tract of 14,000 acres. No sale of any part or portion of the tract of 14,000 could, therefore, be made without a judgment against the San Francisco Savings Union and the trustees under said trust created by said deed from Staacke to Campbell and Kent, and the pretended sale under the so-called second judgment in Bell v. Staacke was void and passed no title, right or equity.

The conception of the learned solicitors for appellees Hammon and Van Deinse as to the equitable doctrine requiring tender to be made in certain cases is (pp. 61-62) novel, for they admit (Tr. pp. 277) that 10,067.2 acres were of the value of $500000 when Teresa Bell paid the indebtedness due the San Francisco Savings Union under the trust deed executed to Campbell and Kent, amounting to $179,411.40, and that the development of oil near said 10,067.2 acres made them prospectively worth at least one million dollars or more, and their clients have, if we are reliably informed, contracted to purchase about 2,000 acres out of said 10,067.2-acre tract of land for about $1,200,000 and have paid to Teresa Bell as such administratrix and to heirs of Thomas Bell on account of said contract more than $400,000. Said administratrix has also received large sums of money as rental from said 10,067.2-acre tract. She and the heirs of Thomas Bell have therefore received not only the amount paid to the San Francisco Savings Union and the amount adjudged in the first decree of *Bell* v. *Staacke* to be due from John S. Bell to Thomas Bell, but a large sum of money in addition thereto. It must have been obvious to these learned gentlemen and their clients that instead of there being any money due or required to

be tendered by the appellant here to Teresa Bell there was money due from Teresa Bell as such administratrix to the appellant. The equitable doctrine of tender is utterly inapplicable to the case now before this Court.

The limitation of time within which to serve and file a notice of intention to move for a new trial by section 659 of the Code of Civil Procedure was as absolute a limitation upon the jurisdiction of the court as any of the sections of the same code limiting the time of appeal, and it could not be extended by any construction of the court. It fixed the time at ten (10) days "after notice of the decision of the court," and by section 633 provides and declares that the "decision" shall state "the facts found and conclusions of law" and that the judgment upon the decision must be entered accordingly," and thereby makes all findings and conclusions of law of the court a part of the decision. It follows, therefore, that the decision in Bell v. Staacke on the first trial was not complete or filed until the seventh day of June 1901, when finally the court completed it as a basis for the judgment that was entered. The time to serve notice of intention under the section of the code cited could not be under the statute a different time from which each party was required to serve the notice. No court would pretend to hold or declare that the plaintiff's time to serve such notice did or could commence before the seventh day of June 1901. The time of the defendants to serve such notice unquestionably expired on the eighteenth day of June, 1901, for they served and filed a notice of appeal from the judgment and from the order denying a new trial on the eighth day of July 1901 (tr. p. 106), and said judgment recites (tr. p. 12) the making and filing of an amendment of the decision on June 7th 1901. Said appeal not only disclosed knowledge and notice of the amendment of the decision but was a distinct waiver of any notice of the decision. (9 Pac. Coast Law J., 765; 97 Cal., 15.) Where one has actual knowledge of a de-

cision, formal notice is not necessary. (77 Cal., 527-529; 116 Cal., 139; 95 Cal., 251; 95 Cal., 368; 99 Cal., 178; 69 Cal., 559; 90 Cal., 562.)

Mr. Blakeman and Mr. Crosby in their brief have paid little or no regard to the record as made by the Transcript on Appeal and have given a somewhat colored statement as to pleadings not before the lower or this Court and not contained in the record. This transgression on their part will be so obvious to this Court when it has read the transcript that we deem it unnecessary to point out the many instances in which they have disregarded the boundaries of the record in this case. They even refer to the original complaint in *Bell* v. *Staacke* which ceased to have any vitality whatever in the case in which it was filed and was radically amended upon motion and order after elaborate argument so as to conform to the truth and the facts as disclosed to Mr. Crittenden at the time of the trial of said case of *Bell* v. *Staacke*. All of this digression from the record has a coloring which marks it as intended to influence and prejudice the minds of the Justices of this Court. Had they been actuated by an intent to be fair and not to mislead the Court, they might have truthfully stated to the Court the following facts, to-wit: that Judge Day, one of the most honorable judges that ever presided on the bench, after a full trial of that case, found and decided every fact and issue as to the trust and in fact every issue, except as to the indebtedness of John S. Bell individually to Thomas Bell, in favor of the plaintiff in that suit and in accordance with the allegations of the amended complaint; that Judge Day could not have decided otherwise without utterly ignoring and disregarding the uncontroverted testimony of Rosener, George Staacke, John S. Bell, Mrs. Kate M. Bell and Mr. Hathaway and a letter of Thomas Bell stating an agreement in writing made by Grover and Rosener with him and John S. Bell as to the conveyance of said tracts of land back to himself and John S. Bell;

that the appeal taken from Judge Day's judgment was dismissed on the ground of a want of jurisdiction to hear it; that the order denying a new trial was affirmed by the Supreme Court and after its affirmance a rehearing was granted by *two* of the justices at the instance of the chief justice who joined them in granting the rehearing upon a petition that was never served upon the attorneys for the respondant on that appeal; that on the rehearing the Court not only usurped a power and jurisdiction which it had repeatedly held unanimously in bank it did not have, but also, utterly disregarding the constitution and laws of this state and innumerable decisions attempted to reverse the order denying a new trial on the ground that a material finding of fact supported by the testimony of those five witnesses and said written agreement and many letters of Thomas Bell was unsupported by the evidence—a decision upon which we forbear to comment only because we deem the appropriate language to such a high-handed attempt to defeat and deny justice might be considered by this Court out of place in this brief; that on the so-called re-trial of said action of Bell v. Staacke and on every proceeding thereafter and on appeal the plaintiff in said suit objected to the jurisdiction of the Court; that on said so-called re-trial Grover appeared as a witness and testified substantially the same as Rosener and that other evidence was presented by plaintiff including all the evidence and testimony on the first trial, and the new judge, Taggart, in deciding the case stated that the additional testimony and evidence was only corroborative and cumumlative evidence and that he saw no reason to differ from the Supreme Court as to the findings of fact, virtually making the Supreme Court the julge as to the facts and the trial a mockery and a farce.

Messrs. Blakeman and Crosby however show by their statements (pp. 18-29) that the parties represented by them in *Bell* v. *San Francisco Savings Union* plead-

ed therein every fact, matter and issue raised and involved by the pleadings in *Bell* v. *Staacke*—that the San Francisco Savings Union, Campbell, Kent, George Staacke and the Mercantile Trust Company, defendants in *Bell* v. *San Francisco Savings Union,* filed a cross-complaint "against the plaintiffs and against Teresa Bell as administratrix of the estate of Thomas Bell, deceased, and against the defendant to cross-complaint, U. S. Oil and Land Company," and in their said cross-complaint "alleged that on the 8th day of March, 1893, John S. Bell commenced an action against the defendant, George Staacke, and against the executors at the time of the will of Thomas Bell wherein he claimed to be the owner in equity of said tract of land of 10,000 acres and demanded judgment that Staacke convey the same to John S. Bell (meaning said action of *Bell* v. *Staacke et al.*)" (pp. 25) that said indenture of December 22nd 1896 was duly made and recorded (pp 26)—that in and by said cross-complaint the San Francisco Savings Union, Campbell, Pond, Kent, George Staacke and the Mercantile Trust Company demanded "that this Court, *having been vested by this action with jurisdiction with respect to the said tracts of land* for the purpose of determining the issues raised herein by the complaint and answers thereto, RETAIN SAID JURISDICTION FOR THE PURPOSE OF DOING COMPLETE JUSTICE AND DETEMINING COMPLETELY *ALL* CONTROVERSIES WITH RESPECT TO SAID TWO TRACTS OF LAND, AND FOR THAT PURPOSE TAKE UNDER *ITS DIRECTION AND CONTROL THE EXECUTION* BY DEFENDANT, MERCANTILE TRUST COMPANY OF THE TRUST CREATED BY THE SAID DEED OF TRUST." (pp. 25)—the facts set out in said cross-complaint (pp. 25-27)—that on June 13th 1904 before the trial of *Bell* v. *San Francisco Savings* Union Teresa Bell as such administratrix filed a further amended answer to the complaint of the plaintic alleging the pendency of the action of *Bell* v. *Staacke* and asking "that this action *Bell* v. *San Francisco*

Savings Union) as between the plaintiff and herself, in so far as concerns the trust upon which the defendant George Staacke holds the land described in Paragraph 1 of the complaint herein, abate or to be continued until the final determination of said action No. 2826" (pp. 27-28) and that the trial proceeded upon ALL OF THE ISSUES MADE BY THE PLEADINGS NOTWITHSTANDING THE LAST AMENDMENT AFORESAID TO THE ANSWER OF THE DEFENDANT TERESA BELL AS ADMINISTRATRIX . . . . .—and that "*the Court. . . . . made its findings and decision in favor of the San Francisco Savings Union and the Mercantile Trust Company ON THEIR CROSS-COMPLAINT,* except that it was found that the defendant Teresa Bell as administratrix was entitled to have the 10,000 acre tract offered for sale first by the trustee Mercantile Trust Company" (pp. 28-29), (The Court found (Tr. pp. 71) that is was never so understood or agreed between the San Francisco Savings Union and George Staacke).

We hereby call the Court's attention to the fact that the Court decreed that said administratrix take proceeds after paying the San Francisco Savings Union nothing under its decision and decree—that all surplus be paid to "George Staacke, his heirs and assigns" and declared in its conclusions of law that it retained jurisdiction of said action for the purpose of dong complete justice and determining completely all controversies with respect to said two tracts of land." (Tr. pp. 72).

Neither Teresa Bell nor any other party to the suit of *Bell* v. *San Francisco Savings Union* ever subsequent to the trial thereof applied to the Supreme Court for a continuacne of the hearing of the appeals taken from the judgment and order denying a new trial therein until that court had passed upon the appeal taken in Bell v. Staacke, though they could have done so under the decisions of the supreme court above cited and

though they knew from those decisions that a failure to do so was a waiver of any claim of bar or estoppel under or by reason of any judgment in Bell v. Staacke, and that judgment and decree in the later suit of Bell v. San Francisco Savings Union would by such failure and waiver become final and conclusive over every matter adjudicated in or by any judgment in Bell v. Staacke.

In a discussion of the doctrine laid down in Gelpoke v. Dubuque and Burgers v. Seligman in appellant's opening brief at pages 51 and 52, we omit to cite the case there referred to, which is Kuhn v. Fairmont Coal Company, 215 U. S. 349, 54 L. ed. 228.

In this case the certificate of the Circuit Court of Appeals sent up the following question to be answered by the Supreme Court of the United States:

> "Is this Court bound by the decision of the supreme court in the case of Griffin v. Fairmont Coal Co., that for damages for a tort, based on facts and circumstances almost identical, the language of the deeds with reference to the granting clause being in fact identical, that case having been decided *after* the contract upon which defendant relies was executed, *after* the injury complained of was sustained, and *after* this action was instituted?"

After stating that the scope of the decision in the Griffin Case covers the case before the court and reviewing the principles involved, it says:

> "We take it, then, *that it is no longer to be questioned* that the Federal courts, in determining cases before them, are to be guided by the following rules: 1. When administering state laws and determining rights accruing under those laws, the jurisdiction of the Federal court is an independent one, not subordinate to, but co-ordinate and concurrent with, the

jurisdiction of the state courts. 2. Where *before the rights of the parties accrued,* certain rules relating to real estates have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the Federal court as authoritative declarations of the law of the state. 3. *But where the law of the state has not been thus settled,* it is not only the right, but the duty of the Federal court to exercise its own judgment, as it also always does when the case before it depends upon the doctrines of commercial law and general jurisprudence. 4. So, *when contracts and transactions are entered into the rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved, then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of the parties accrued.*

"The court took care, in Burges v. Seligman, to say that *the Federal court would not only fail in its duty, but defeat the object for which the national courts were given jurisdiction of controversies between citizens of different states,* if while leaning to agreement with the state court, it did not exercise an independent judgment in cases involving principles not settled by previous adjudications."

The court then proceeds to distinguish certain other cases which would seem to overrule the decisions of Gelpcke v. Dubuque and Burgess v. Seligman, as follows:

"It has been suggested—and the suggestion cannot be passed without notice—that the views

we have expressed herein are not in harmony with some recent utterances of this court, and we are referred to East Central Eureka Min. Co. v. Central Eureka Min. Co. 204 U. S. 266, 272, 51 L. ed. 476,481, 27 Sup. Ct. Rep. 258. That case involved, among other questions, the meaning of a deed for mining property. This court, in its opinion, referred to a decision of the state court as to the real object of the deed, and expressed its concurrance with the views of that court. That was quite suucient to dispose of the case. But in the opinion it was further said: 'The construction and effect of a conveyance between private parties is a matter as to which we follow the court of the state'—citing Brine v. Hartford F. Ins. Co. 96 U. S. 627, 636, 24 L. ed. 858,861; De Vaughn v. Hutchinson, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461. Even if the broad language just quoted seems to give some support to the contention of the defendant, it is to be observed that no reference is made in the opinion of the numerous cases, some of which are above cited, *holding that the Federal court is not bound, in cases between citizens of different states, to follow the state decision, if it was rendered after the date of the transaction out of which the rights of the parties arose. .Certainly there was no purpose on the part of the court to overrule or to modify the doctrines of those cases;* and the broad language quoted from East Central Eureka Min. Co. v. Central Eureka Min. Co. must therefore be interpreted in the light of the particular cases cited to support the view which that language imports.'

On several occasions efforts have been made to lead the Supreme Court of the United States to apply the doctrine laid down in Gelpeke v. Dubuque to the construction of articles of the Constitution like that pro-

hibiting a state from passing a law impairing the obligation of contracts and which are express limitations upon the state legislature, with the object of bringing the decisions of state courts before it for review upon the ground that a Federal Question is involved; but the court has uniformly held that the same questions passed upon in the principal cases cannot be raised upon a writ of error to a state court. Such a case is that of Cross Lake Shooting & F. Club v. Louisiana, 224 U. S. 632,638, cited at page 29 of the brief of Appellees Hammon and Van Deinse.

Such another case is the one cited by Mr. Goodrich on the oral argument, viz. Ross v. Oregon, 220 U. S. 150,163. This was a writ of error to the state court and the Supreme Court was asked to hold that the action of the state court in judicially construing a state statute as making criminal certain acts done since its enactment, over the objection that to put such a construction upon the law violated the prohibition of the Unted States Constitution upon states against passing ex post facto laws, and the court held that no Federal question was presented which would sustain a writ of error to the State Court, since the constitutional provision was a restraint upon legislative, and not judicial action. In this connection the court says:

> "The plaintiff in error cites the cases" among others "of Muhlker v. New York v. H. R. Co. 197 U. S. 544, 49 L. ed. 872 . . . Gelpcke v. Dubucke: . . . "as holding that a judicial decision may be a law in the sense of the constitutional provision which he invokes. But none of those cases, when rightly considered, sustains that position."

The court from the beginning of this line of decision in Gelpcke v. Dubuque and Burgess v. Seligman has carefully, conscientiously and persistently exercised its right to disregard the latest decision of a court of a state overruling the settled decisions of the state

at the time the contract was entered into, or refusing to follow a late decision, when there was no settled, or any rule of decision of state court, at the time the contarct was made, where to do so would impair the obligation of the contract, only in cases ~~owing~~ coming before it by writ of error or appeal from inferior Federal Courts where the jurisdiction attaches upon the ground of diverse citizenship. Here they are free to, and do, giv expression to a rule of equity and justice, which they cannot recognize when construing constitutional provisions expressly restricting the legislative action of State Courts. This is what renders the case at bar a perfect type and one exactly in line with the reasoning of Burgess v. Seligman.

Campbell and Kent as such bona-fide and innocent grantees and trustees of the entire tract of 14,000 acres, the Mercantile Trust Company as their successor and grantee, and the San Francisco Savings Union as a bona-fide and innocent incumbrancer and beneficiary of said grant and conveyance to Campbell and Kent and of the trusts therein and thereby created, had the absolute right—and also under said indenture or agreement of December 22nd 1896 had the absolute and infeasable right to demand and did demand of and from the court in and by a cross-complaint against all parties and all successors in interest of Staacke, of Thomas Bell and of John S. Bell, in Bell v. San Francisco Savings Union (Blakeman and Crosby brief p. 25) "that this court, having been vested by this action with jurisdiction with respect to the said *two* ~~said~~ several tracts of land * * * * retain said jurisdiction for the purpose of doing *complete justice and determining completely all controversies* with respect to said *TWO* tracts of land" etc. This demand was made after Campbell, Kent, and the San Francisco Savings Union had threatened to sell the 4,000 acre tract (B & C. brief p. 24) after Teresa Bell as such administratrix and George Staacke had by an amended answer in Bell v. San Francisco Savings Union "set forth substan-

tially the same matters that were pleaded in the cross-complaint of the defendants in the action of Bell against Staacke" (see B. & C. brief p. 21); that is, all of the relations between all of the parties and especially those between John S. Bell and Thomas Bell and both of the Bells and Staacke and all of the issues of fact and law involved and raised by the pleadings in Bell v. Staacke, thereby voluntarily and affirmatively seeking a decision upon all of the said issues and relations of the parties in said later suit of Bell v. San Francisco Savings Union and necessarily waiving and abandoning any claim for the continuance or abatement of said later suit; and after the San Francisco Savings Union, Campbell, Kent, Pond, George Staacke and the Mercantile Trust Company had by their said cross-complaint (B. & C. brief pp. 25-26) coupled with their said demand an allegation as to the pendency of said suit of Bell v. Staacke and the claims and issues involved therein. Mr. Blakeman and Mr. Crosby, in their statement of the pleadings in Bell v. San Francisco Savings Union, shrewdly omit to state that the complaint in that suit alleged all the relations between the parties as fully as was alleged in the complaint in Bell v. Staacke.

Teresa Bell as such administratrix could not both seek a decision in Bell v. San Francisco Savings Union of every issue involved in Bell v. Staacke and at the same time ask the court to continue or abate the suit, nor could she ask the Supreme Court upon such pleadings either to continue or abate said suit or to continue the hearing of the appeals therein until they had decided the appeals in Bell v. Staacke. It was the positive and absolute duty of the court upon the issues raised by the pleadings to take jurisdiction of both tracts of land and to decide in Bell v. San Francisco Savings Union every issue raised by the pleadings, every controversy between the parties, and every relation between each and all of the parties to the suit, for they were presented by the pleadings and any failure to find upon each and all of said issues and matters and to adjudicate the same

would not only have been an utter disregard for and violation of its duty but it would have caused a mistrial or failure to try the suit.

The court performed its duty, complied with the demands made upon it, above stated, found upon every issue and matter, and adjudged that it would administer in the suit of Bell v. San Francisco Savings Union 'complete justice and determine completely all controversies with respect to said TWO tracts of land' and would 'for that purpose take under its direction and control the execution by defendant Mercantile Trust Company of the trust created by said deed of trust executed to Campbell and Kent.' We say that the decree in Bell v. San Francisco Savings Union, construed in the light of the pleadings therein, in accordance with the indenture of December 22nd 1896 and the conduct of the parties in the suit, said demand made by the Mercantile Trust Company and its co-plaintiffs in the cross-complaint, and the findings of fact and conclusions of law, can only mean that the court did assume full jurisdiction over all controversies between any and all of the parties, including all relations of the parties and all matters and facts stated in its findings, and did adjudicate completely all such controversies, issues and relations of every kind and character.

We can but attribute to ignorance of equity pleading, ignorance of the principles of equity jurisprudence, an excess of zeal for their client's interests resulting from a large cash or expected fee, or an utter disregard of the truth, the statement made by Messrs. Slack and Goodrich on pages 61-62 of their brief as to the Bill of Complaint in this suit—to-wit, "Its iniquity is apparent. The appellant endeavored to obtain by its pleading the benefit of the vacated judgment in Bell v. Staacke by a baldfaced and intentional suppression of the fact that six subsequent judgments, in the trial and in the appellate courts, vacated that decree and directed results wholly different." It is hardly credible that attorneys of such experience did not know where a court or

courts are without jurisdiction any and every judgment rendered by them is absolutely null and void and assailable not only directly but collaterally. We assert, and we believe we have shown that the so-called judgments and decisions in Bell v. Staacke in the Superior and supreme courts were absolutely void for want of jurisdiction, and the supreme court itself, in Bell v. San Francisco Savings Union, declared that it did not and could not have any jurisdiction of those appeals and its attempted modification of the amount adjudged or fixed by the judgment of the lower court was utterly void, and all its statements are mere dicta and entitled to no weight or consideration. We say further that the superior court had no jurisdiction, power or authority to grant the writ of assistance in Bell v. Staacke against Kate M. Bell and the Supreme Court had no jurisdiction, power or authority to affirm that writ or the proceeding thereon, but neither the U. S. Oil and Land Company nor its grantors were served with any notice of said proceeding or made a party thereto or had any opportunity to be heard thereon, and cannot be bound thereby. We thus dispose of the so-called "six subsequent judgments" so courteously mentioned in the Slack-Goodrich brief and which were so earnestly and persistently urged by them upon the judge of the District Court and were so magnified in their importance to him as to control and subjugate his mind and cause him to overlook or disregard the merits of the Bill, the great principles of equity jurisprudence and the decisions of the Supreme Court of the United States cited by complainant's solicitors and counsel.

It is respectfully submitted that the judgment of dismissal should be reversed and set aside and that the complainant (appellant here) is entitled to a decree upon the pleadings as prayed for in the Bill and to an order of this court directing the making and entry of such decree in and by the District Court.

Serious and continued illness has prevented my writing this brief as fully and connectedly as I desired

and intended and from arranging it in points or subdivisions, and I am compelled to respectfully submit it with an apology to the court for its many imperfections and deficiencies.

December 6th 1914.

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